BORA LASKIN LAW LIBRARY
3 1761 04866 8180

THE CANADIAN CONSTITUTIONAL TRADITION

1999-2000

Professor Risk

Faculty of Law
University of Toronto

Storage
KF
4482
.R57
1999
c.1

KF 1151
BORA LASKIN LAW LIBRARY
SEP - 9 1999
FACULTY OF LAW
UNIVERSITY OF TORONTO

BORA LASKIN LAW LIBRARY
UNIVERSITY OF TORONTO

THE CANADIAN CONSTITUTIONAL TRADITION

1999-2000

Professor Risk

Faculty of Law
University of Toronto

THE CANADIAN CONSTITUTIONAL TRADITION

1999-2000

Professor Risk

Office: Room 3029 (Second Floor, Library)
Phones: 705-277-9408 (home)
416-978-5540 (office)
Email: dick.risk@utoronto.ca

CANADIAN LEGAL THOUGHT IN THE TWENTIETH CENTURY

Part I The Late Nineteenth Century: The Original World

Chapter 1 The British Constitution

Note — Beliefs About Law And Legal Reasoning 1
Dicey — The Law Of The Constitution 5
Sugarman — Review 27

Chapter 2 Interpretation

Note — Interpretation In The Late Nineteenth Century 32
Maxwell — The Interpretation Of Statutes 37

Chapter 3 Federalism

Note — Federalism In The Late Nineteenth Century 41
Lefroy — The Law Of Legislative Power In Canada 49

Chapter 4 Rights

Note — An Introduction To the Rivers And Streams Affair 60
Speeches In Parliament 62
Risk and Vipond — Rights Talk In The Late Nineteenth Century 71

Chapter 5 Legal Education

Langdell — Preface 80
Reeve — Inaugural Address 82

Part II The 1930s: The World Turned Upside Down

Chapter 6 Legal Thought Generally: The Realists

Note — Legal Thought In the 1920s and 1930s 85
Fisher — American Legal Realism 87
Singer — Legal Realism Now 90
Cook — Scientific Method and the Law 98
Cohen — Transendental Nonsense 106
Risk — Volume One of the Journal: A Belated Review 120
Kennedy — Some Aspects ... Constitutional Law 124
Wright — An "Extra-Legal" Approach to Law 128

Chapter 7 Interpretation

Note Interpretation in the 1920s and 1930s 135
Smith The Residue of Power in Canada 137
Corry Administrative Law 139
Willis Statute Interpretation In A Nutshell 142
Note Suggestions About The Interpretation Scholarship 152

Chapter 8 Federalism

Note Federalism In The 1920s and 1930s 153
Scott The Development Of Canadian Federalism 155
Kennedy Law and Custom In The Canadian Constitution 160
Kennedy Our Constitution In The Melting Pot 163
Macdonald Judicial Interpretation 165
Note The C.B.R. Symposium 167
Note The O'Connor Report 169

Chapter 9 The Administrative State

Note The Administrative State In The 1920s and 1930s 171
Dicey The Law Of The Constitution 172
Dicey The Development Of Administrative Law 176
Hewart The New Despotism 179
Loughlin Public Law And Political Theory 182
Landis The Administrative Process 189
Willis Three Approaches To Administrative Law 193
Risk Lawyers, Courts, And The Rise 206
Hopkins Administrative Justice In Canada 207

Chapter 12 Legal Education

Risk The Many Minds Of W.P.M. Kennedy 219

NOTE: BELIEFS ABOUT LAW AND LEGAL REASONING AT THE END OF THE NINETEENTH CENTURY

This first chapter is about the British constitution at the end of the nineteenth century. This note, though, is a look at legal thought generally. The reason for including it is that for lawyers then, the primary, foundational law - the core of their thought and their legal world, was the common law, and the constitution was, as we shall see, essentially a common law one. We need, therefore, to have some understanding of this common law.

During the second half of the century, a widely shared way of thinking about such topics as the nature and proper functions of legislatures and courts, and the appropriate materials and ways of legal reasoning became dominant among lawyers in England, the United States, and Canada. For England and Canada, this way of thinking was expressed primarily by scholars, especially a small group at Oxford that included William Anson, Albert Venn Dicey, William Markby, and Frederick Pollock. Its basic elements were the equality and autonomy of individuals (and legal entities generally), a division between the public and private realms, and the paramountcy of the common law and the courts. Legal reasoning was distinctive, and sharply separated from politics and context. Of course, this description is a model, and even as a model, it is greatly simplified. The minds of individual lawyers were much more complex and muddled, and included inconsistent elements, and there were differences among individuals and between generations, and between practising lawyers and the profession.

For this introduction to the common law, we shall look at Canadian lawyers. They wrote very little about the general nature of the common law, either by way of description or critical inquiry, so the major source must be the brief, fragmentary comments in book reviews and editorials in the law journals. The tone of this writing, and perhaps its very scarcity, suggest that these beliefs were untroubled and widespread. Throughout, it demonstrated an immense pride in an ancient body of law and procedures, which had given justice and liberty for centuries to the English people, and continuously adapted itself to their changing needs.

A collage of the beliefs emerges from these fragments. The basic elements of the common law were its principles - the "pillars that support the building." For example, at the opening ceremonies for the revitalized Osgoode Hall law school, the new principle, Reeve, spoke of "the great fundamental principles of Law" (he meant the common law), and declared that the chief function of the school was "the cultivation of the right understanding of legal principles," for the purpose of applying these principles to the manifold problems of clients. These principles, or at least the major ones, had changed in response to the changing needs of their society, albeit slowly, and more in the distant past than recently. In deciding individual cases, judges reasoned from these principles, and applied them to the particular facts before them, and once decided, the cases became both applications and illustrations of the principles. As well, decided cases were precedents that future courts

were obligated to follow. In reasoning in this way, the only permitted materials were the principles and the cases. A judge might, perhaps, be influenced by personal values or some element of the social context, but this was simply a mistake - as though a sign in a mathematical calculation had been ignored or misread. The role of the judges was objective and apolitical; they had no discretion, or, whatever discretion they had must be exercised according to law. This common law was often and with pride called a science, although term seemed to have little bite, meaning little more than functional organization and internal coherence of doctrine, and sometimes a contrast to practical or day-to-day practice.

This collage contained uncertainties and tensions. What was the nature of the principles? Doubtless, they were they general guides, such as "sic utere tuo ...", but were they firm rules as well, such as the detailed doctrines about interests property? Where did they come from? The usual belief or working assumption was that they were derived from the decided cases. But was the process of making principles and deciding cases simply circular: were the principles were derived from cases, and the cases were decided by applying the principles. If individual cases were binding, should a judge follow the case or an inconsistent principle? And change how could law change and how could it embody values, such as liberty and bodily security, if the decided cases alone and were the sources of the principles and must determine the results of disputes?

Some of these questions, for example, the nature of change and the role of judges, were manifestation of grand questions that had endured for centuries. More important for our purposes, some were caused by changes in legal thought in England to which Canadian lawyers were unhesitatingly faithful. During the nineteenth century, especially in its second half, positivism became the dominant jurisprudence, together with a tendency to think of the common law as a set of rules rather than a set of procedures for deciding individual disputes by drawing on the collected wisdom of the community. At the same time individual cases became binding, and analysis of cases crowded out other considerations. In thinking about doctrine and writing texts, a strong drive towards synthesis of subjects replaced the tangle of the forms of action.

Apart from the brief, fragmentary comments from which this collage is made, the bulk of the routine writing about the common law, expositions and debates about doctrine in articles and texts, prize winning essays, and lectures to law students, were composed virtually entirely of analysis of cases. Moreover, the analysis tended to take the form of a case by case accumulation, rather than integration and synthesis. The standard of correctness or winning a debate was consistency with the cases, or the majority of them, and the differences of opinion were about the accuracy of different readings of the cases. Context or values were never considered, although they were occasionally expressly declared to be irrelevant.

The only Canadian lawyer who wrote at any length about the common law was A.F.N. Lefroy, whom we will see again, in considering federalism. His thought was typical of this late nineteenth century thought. Throughout his writing, the work of the courts in

applying the settled common law appeared to be objective and apolitical. They found facts and applied the appropriate general rule, and the scientific process ensured that there would be only one appropriate rule, even though determining it might be difficult and debatable. This common law was autonomous, although this concept does not mean that Lefroy believed the law did not express values about society, for he clearly did: the sources from which it was made were all statements of values, but they all seemed to be abstract and independent from their immediate context of place and time. There was no suggestion in any of the examples of law-making that there was a choice between social interests or classes at stake.

This autonomy was fortified by a sense that lawyers, especially judges, were the custodians of the legal science and the process of making law from these values and applying it. It was probably also related to the explanation for the rule that settled law could not be changed. Considering change, conceived as anything different from correcting a error in reasoning, would involve considering some particular social and political context, and might ultimately suggest that the common law and its basic principles were contingent upon the conditions of each society.

Lefroy's positivism, his faith in precedent, and his general understanding of the common law all might have been found in any common room or text in England. His major effort and his claim to distinctiveness was his discussion of law-making. How could judges make law, and also be objective and apolitical? Most thinkers of his generation considered this problem, perhaps because the dominant positivism had made it pressing. Lefroy found the resolution in the process of reasoning from the basic principles and understandings. The courts did not declare their own personal wills or choices. Instead their work was "discovering the implications and equities inherent in the transactions and relations of mankind," and declaring "the law's intention" that was embodied in the terms of the broad principles.

Some Questions About Dicey

Dicey was one of the major English legal scholars in the late nineteenth century, and his text was the dominant constitutional text for decades. Reading it gives an understanding not only of the basic knowledge of constitutional of English and Canadian lawyers, but their assumptions about law and how to think about law. We will return to it a couple of times during the sessions that follow, in discussions of both rights and federalism; this chapter is intended to be no more than an introduction.

Here are some questions for reading and for discussion:

1. What was Dicey's understanding of his job as teacher and as the author of the book? This question is pretty easy, because the answer is given in his own words in his Introduction, so the next question is, what sorts of assumptions about law and thinking about law did his understanding entail? How did these assumptions shape the text?

2. What did Dicey mean in the claim that the American constitution ("the institutions of America") was "a gigantic development" of the ideas at the bottom of the English political and legal institutions?

3. The "rule of law" is something that all sorts of societies have believed in and something that English lawyers believed in long before Dicey wrote. What seems to be distinctive about his understandings - or, what are its fighting edges?

4. What was Dicey's understanding of rights, and why did he believe they were so well protected in England?

5. Here is a passage about Dicey from S. Collini, *Public Moralists* (Cambridge, Cambridge U.P., 1991)

> Dicey ... pulled off a remarkable coup: his Law of the Constitution, first published in 1885, managed to make the ordinary operations of the common law central to the characterization of the distinctive identity of the English nation. In so doing, he achieved the improbable fusion of the Wig interpretation of English history, the Austinian analysis of law, and the Individualist conception of the state, the whole amalgam presented as the dispassionate conclusion of academic legal science.

What on earth did Collini mean? (Maybe we should know lots about Whig history, and Austin, but here, I hope it is enough to say only this: First, the Whig interpretation of English history is an interpretation (a story) of history of the English peoples that traces the slow progress towards liberty; it is well represented by the quotation from Hallam at the outset of the Dicey excerpt. Second, Austin is a nineteenth century English legal thinker who is famous for separating law and politics, and for making the idea of the sovereign central to legal analysis.

NOTE: INTERPRETATION IN THE LATE NINETEENTH CENTURY

In 1892, the Privy Council announced that the B.N.A. Act must be interpreted "by the same methods of construction and exposition which they apply to other statutes (Bank of Toronto v. Lambe (1887), 12 A.C. 575 at 579). These "methods" were not discussed at any length by the Canadian writers, because they needed no discussion: they were widely shared and the English texts were conveniently at hand and unproblematic. One of the standard texts, Maxwell, *On the Interpretation of Statutes,* can serve as an example, even though no single source can embody all the complexity, detail, and variations of the period. Maxwell's first sentence was, "Statute law is the will of the Legislature; and the object of all judicial interpretation is to determine what intention is either expressly or by implication conveyed by the language used." This single sentence encapsulated his basic faiths: the legislature had a will, which could be expressed in words; task of interpretation was discovering the meanings of these words, and these meanings were independent of the interpreter and the process of interpretation.

Maxwell continued by saying that if the meaning of words of a statute was "free from ambiguity," it must prevail, even though it might be unreasonable or unjust. Contrary to some caricatures drawn by twentieth scholars, neither Maxwell nor any other text-writer of his period believed that meanings were always plain, awaiting discovery. A few lines later, he said, "... language is rarely so free from ambiguity as to be incapable of being used in more than one sense." When language was "open to doubt, and capable of receiving more than one construction, the true meaning" was to be sought by considering the words in their context within the statute, their history, and "certain general principles. Most of the remaining 350 pages of the text elaborated these sources of meaning. Throughout this elaboration, the courts and the common law were central. In particular, the "certain general principles," were largely common law presumptions, made by courts. Much of the content of these presumptions was a consolidation of widely shared liberal constitutional values, but as well much was an expression of economic and class preferences, which were often at odds with the manifest intention of the legislature. The process of determining meaning was independent of context, values and needs. In particular, ideas about the kind of federalism that might be appropriate for Canada were simply irrelevant. In the course of a debate about a controversial decision about the power of provinces to regulate sittings of courts, one British Columbia lawyer declared that the opinion of Alfred Todd's opinion deserved no respect: Even though he was an eminent constitutional scholar, he lacked "long years of legal training," and his work as an historian might have given him a "broader range" but it might also have given him a "tendency to look at expediency or policy." (An Exile, "Administration of Justice in British Columbia" (1882), 18 Can L.J. 244 at 245)

Another example is a passage from A.F.N. Lefroy, who appeared briefly in the first chapter, in his text, *The Law of Legislative Power in Canada* (Toronto: Law Book and Publishing, 1897-1898). It was the leading text on the division of powers and we will see it at length later. Lefroy declared that, because a constitution could not expressly provide for every possibility, "use was made ... of general language, containing in principle the

conferred powers, and leaving to legislation and judicial interpretation the task of completing the details." His understanding here was that the B.N.A. Act contained the essential meanings, and he did not imagine that the courts were to have any original or creative power. Near the end of his discussion he quoted from a major American constitutional text by Joseph Story, about the need for interpretation, "influenced by the demands of public policy and public welfare." For Lefroy such matters were irrelevant to interpretation, and he fled quickly to his basic belief in the general principles. Lefroy did, though favour a "liberal" interpretation. In Proposition Three, he quoted the Privy Council about interpretation, and added, "... [other statutes] of a similar character, that is to say, statutes conferring constitutional charters. The B.N.A. Act cannot be construed in a rigidly technical manner." This awkward formulation was probably more than a muddled attempt to synthesize inconsistent cases. Lefroy seemed to hope that constitutions were a distinctive kind of statute, which was just what the Privy Council sought to deny.

One tempting source of information about legislative intention was the debates preceding Confederation, which were within memory of most judges and writers. The settled doctrine, however, was firm: the only kinds of history that could be considered were the common law and earlier statutes. Social and economic history, and evidences of the plans and intentions of the legislators were utterly inadmissible, a limitation that made interpretation seem apolitical and supported the power of the courts, by preferring the common law presumptions to evidence of legislative intention. In Canada, the firm exclusion of context and history was required by their faithful following of English models, but this obligation does nothing to explain the limitation itself. Ultimately, it was based on the nature of the threat history presented. To consider debates and context, in preference to the common law principles and presumptions, threatened to deny the lawyers' power, and to erode the property of their clients and friends. These were formidable costs, and formidable pressures to eschew history. This limitation was a sharp contrast to understandings of interpretation in other disciplines, especially literature and religion. Throughout the nineteenth century, the Protestant churches in England, the United States, and Canada struggled with the question whether the history of doctrine could affect its meaning. Was the bible just like any other book, to be read by the understandings that guided reading other books? Throughout the second half of the century, the churches accommodated these challenges and their doctrine.)

The separation of interpretation from value and history did not, though, entail a belief that law was entirely autonomous. A passage from another text, Clement's *The Law of the Canadian Constitution* (Toronto; Carswell, 1892) suggests that the thought was not so simplistic. Speaking about Confederation, he said, "opinions may very reasonably vary at different periods as to where the line should be drawn that is to divide matters of common or "national," from matters of "local" concern." The choice of the line was a matter of opinion - contingent and political, and there was no essential nature of local and general. Yet once the line was expressed in the B.N.A. Act, it became law, "a thing certain," to be determined by the objective legal science, and arguments about where the line should be drawn in order, for example, to encourage economic development or to protect distinctive cultures became entirely irrelevant. The line between general and local expressed in the

B.N.A. Act was at the same time both an expression of values and an objective standard. In his discussion of the aspect rule, Clement said,

> Of any number of laws put forwards as determining the "legal relation," only one is the law which governs. The views of advocates, and even judges, may conflict, but the law, though it may be, from time to time, varied at the will of the law-making body in the state, is at any given moment of time, a thing certain.

The lawyers' limitations were a sharp contrast to understandings of interpretation in other disciplines, especially literature and religion. In 1889, in the course of giving an inaugural lecture at University of Toronto, W.J. Alexander talking about reading a book, said, "To complete our understanding of the work, or our conception of the writer, we must know something of the intellectual atmosphere which surrounded him, of the current of thought and of the spirit of his time. In doing this, we pass from the study of the individual writer to the study of the period in which he lived." The contrast is even more marked in theology, where the nature of the authority of the bible was put in turmoil by two strains: first, Darwin's ideas about evolution and second, the "higher criticism," movement that argued that the bible must be interpreted in the light of its history and context. In 1881, Nathanial Burwash, the dean of theology at Victoria College, said that language of any text "bears the peculiarity of the age the nation, the writer."

Why were lawyers different? Their firm exclusion of context and history was required by their faithful following of English models, but this obligation does nothing to explain the limitation itself. Nor is the lack of any apparent sense that developments in other disciplines might be relevant an explanation, for Darwin's theory was widely known, at least in a superficial way (in the same way legal scholars now know economics?), and lawyers were sufficiently entangled with the Anglican church to give them some knowledge of the threat from the higher criticism. Maybe the limitation was based ultimately on the nature of the threat history presented. To consider debates and context, in preference to the common law principles and presumptions, threatened to deny the lawyers' power, and to erode the property of their clients and friends. These were formidable costs, and formidable pressures to eschew scholarly developments elsewhere.

A good example of this set of faiths at work is a debate about *Royal Bank of Canada v. The King,* a decision of the Privy Council made in 1913. The issue was the entitlement to the proceeds of bonds issued by a railroad under construction in Alberta, and sold in England under an agreement providing that the proceeds were to be paid into an account of the Royal Bank in Edmonton, to be disbursed as construction proceeded. After the railway floundered, Alberta enacted a statute expropriating the proceeds, which the bondholders challenged, and the crucial doctrinal issue was the location of the proceeds. Reversing the Supreme Court, the Privy Council held that the locus was Montreal, the head office of the Bank, and not Alberta, and therefore the claim of the bondholders to recover the proceeds (because the purpose had ceased to exist) was "a civil right outside the province," and the legislation was invalid.

The debate, waged from 1913 to 1915 in twelve articles, involved three of the major writers of the period and a couple of minor supporters. The first to enter the ring was Lefroy. He defined a civil right as a power to "invoke the aid of the courts of the province by way of action or by way of defence." Because the bondholders had a right to sue the Royal Bank in Alberta, the Treasurer had the same right. Therefore, the claim was a civil right in the province, and the legislation was came within s. 92-13. He argued as well that bondholders also had a right to sue the Bank at its head office in Quebec, implying that Quebec could have enacted similar legislation. Next came J.S. Ewart, from Winnipeg, well-known to Canadian historians as supporter of independence for Canada, one of the leading counsel, and a remarkably powerful thinker, albeit a cranky and erratic one. He argued that the money was in the province, and it was therefore "property" within s. 92-13, or an asset of the company that could be expropriated under s. 92-10. The last of the three principle protagonists was C.B. Labatt, who defended the Privy Council. He was not as learned as Lefroy or as imaginative as Ewart, but was an editor of the Canadian Law Journal and the most prolific periodical writer of the period. He argued that the definition of civil right should be derived from private international law - a substantive right incident to property. According to this principle, the proceeds were in Quebec, not Alberta, and the legislation was therefore ultra vires.

The debate was often heated, but despite their disagreements, all three scholars shared understandings of legal reasoning and interpretation, and basic principles about division of powers issues. Outcomes should be determined using these principles, and subsidiary doctrines appropriate for particular cases, such as the common law doctrines about the location of a debt. In the application of these principles, the nature of federalism, the historical understandings that might illuminate the B.N.A. Act, and the contemporary context were simply not permitted or even contemplated. For example, Labatt and Lefroy did not justify their definitions of civil rights, except for a vague reference to the autonomy of the provinces by Lefroy, and none of the three considered the vulnerability of non-resident bondholders, or the effectiveness of democratic responsibility as a limit on provincial legislatures, even when considering whether Alberta or Quebec, or both, could legislate. Considerations of this sort were not simply irrelevant; instead, they were embedded in the general principles. (My reading, and it is certainly debatable, is that this is what Clement meant in the passage that preceded this account of *Royal Bank*. Certainly outcomes might sometimes be affected by this kind of influence, but this possibility was no more than the possibility of human error and fallibility.

Their understandings about legal reasoning illuminate the gulf between law, and politics and context. In his reply to Labatt, Lefroy challenged a claim, made by one of Labatt's supporters, that no one could doubt the "perfect justice or wisdom" of the Privy Council's decision.

> All I can assume to discuss is law, not perfect justice or wisdom. Law may be, and ought to be, just and wise. But whether it is or not, is a matter with which a lawyer, as such, has nothing to do. That is what the old philosopher Hobbes meant

> when he laid down the dictum so shocking to weak minds, that "no law can be unjust."

Labatt agreed. After Ewart had suggested that the Privy Council had been influenced by a desire to protect property and British investors, and that such influence was not only improper, but a reason for abolishing appeals, Labatt rushed to its defence. Its ignorance of Canadian conditions, which Ewart said was a disqualification, was really an blessing.

> A controversy determined by jurists of ample practical experience, who consider the law and the facts with the intellectual detachment of College professors forming an opinion in regard to the soundness of abstract doctrines may well be said to have been determined under ideal conditions.

NOTE: FEDERALISM IN THE LATE NINETEENTH CENTURY

The major item in this section is an excerpt from a constitutional text: Lefroy's *The Law of Legislative Power in Canada*. There were other texts written in the late nineteenth century, especially including texts by O'Sullivan and Clemment, but Lefroy's was the major one, and the one that best demonstrates the dominant ways of thinking. Our objective will be to reconstruct his understandings about federalism and about ways of thinking about law and legal reasoning. We begin, though, with a long note about Confederation, the provincial rights movement, constitutional scholarship, and the issues that shaped Lefroy's text.

Confederation and Provincial Rights

The major purposes of Confederation, in 1867, were to make a defensive alignment against the United States, to enable expansion to the west, and to resolve a deadlock between the English and the French who had been combined in the large province of Canada since 1841, and who were now divided between provinces of Ontario and Quebec. The objective was to create a powerful, even dominant, Dominion, especially for developing the economy, and at the same time to permit the provinces to determine their local affairs, although there was no clear understanding of what local matters were, except that religion was included. During the preliminary discussions, there were differences of preference and interpretation, about large matters and small ones, and much confusion and misunderstanding. There was no widely shared and comprehensive model or theory of federalism, especially about sovereignty, the relation of the Dominion and the provinces, and the division of powers.

The B.N.A. Act itself created the basic structure of federalism. Legislative powers were divided by sections 91 and 92. Section 92 gave the provinces power to legislate about specific subjects, including "property and civil rights" (section 92-14), and "all other matters of a local and private nature" (section 92-16". Section 91 gave the Dominion power to legislate for the "peace, order, and good government of Canada," excepting the subjects given to the provinces. As well, "notwithstanding" this general grant, section 91 gave the Dominion enumerated powers, including powers to establish a national economy, and concluded by saying that these enumerated subjects were "deemed" not to be matters of a local and private nature. Schools established by minority religions were protected by section 93, and duality of language was given modest recognition in section 133. The Dominion was given substantial controls over the provinces, especially a virtually unlimited power to disallow their legislation, and powers to appoint their lieutenant governors and the judges of superior courts. Any constitution, though, and perhaps any text, must leave much to be determined in the future, and the B.N.A. Act contained more than its share of gaps and inconsistencies.

During the three decades that followed Confederation, politics was dominated by a struggle between the Dominion and the provinces, principally Ontario. For most of this struggle, the Dominion was governed by the Conservative party, led by Sir John A.

NOTE: AN INTRODUCTION TO THE RIVERS AND STREAMS AFFAIR

> I am a friend to the preservation of the rights of property,...but I believe in the subordination of those rights to the public good... I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.

This declaration about property, made by Edward Blake in 1882 is a wonderful beginning to thinking about rights in the late nineteenth century. Presumably, his beliefs were widely shared by Canadian lawyers, for he was the leader of the Liberal party and one of the leading counsel in Canada. Yet what he said would have seemed bizarre or outrageous to most lawyers in the United States at the same time, and surely they are at odds with lawyers' attitudes in Canada a hundred years later. How, we may now ask, could he be content to permit his rights to be at the mercy of a majority, and why did he not mention protection of rights by courts? To emphasize this contrast, consider the beliefs of another lawyer and another leader of the Liberals (and one who, unlike Blake, became a Prime Minister), P.E. Trudeau. Almost a century later, he said, "the purpose of living in society is that every man may fulfill himself as far as possible," and this fulfillment can only be achieved with "the triumph of the freedoms of the human being as inalienable rights, over and above capital, the nation, tradition, the Church, and even the state." And exactly a century (give or take a few days) after Blake spoke, the Charter of Rights and Freedoms was established.

This Chapter is divided into two parts, i) rights generally (plain vanilla thinking about rights?) and ii) rights and federalism, although these two parts are interdependent. The best introduction to both parts is the so-called Rivers and Streams Dispute. It began in the late 1870s as a quarrel between two loggers about the use of the Mississippi River, a small stream in eastern Ontario. One of them, Peter McLaren owned extensive timber lands on both sides of the stream. After making it usable by blasting rocks and constructing dams and slides, he used it to float his own timber downstream. The other logger, Caldwell, owned timber lands upstream, and attempted to drive his logs down the river - and through the improvements. After some squabbling, McLaren sought an injunction to prevent him. Their quarrel had wide-spread implications for Ontario's political economy, for logging was dominant in the economy of Ontario, and the streams were crucial highways for transporting the logs to mills and to markets.

In December 1880, Vice-Chancellor Proudfoot refused to grant the injunction. At the same time, prompted by the quarrel, the government of Ontario enacted The Rivers and Streams Act, giving anyone (and therefore any logger) a right to use any stream, whether it was usable in its natural state or because improvements had been made, and gave the owner of improvements a right to "reasonable tolls." When the Dominion disallowed this Act, a debate in Parliament about the disallowance followed in April, 1882, which exposed fundamental beliefs about federalism, especially disallowance and provincial autonomy,

and rights, especially common law rights. The story that unfolded in the legislatures and politics was a major triumph for the provinces. Ontario reenacted the Act, and reenacted it again after it was disallowed again. Eventually, after the Privy Council decided in McLaren's favour, the Dominion acquiesced.

The major speech for the Conservative government was made by Dalton McCarthy - a fiery orator, a leading counsel, and, as we shall see later, a fervent believer in a British Canada and an erratic political colleague. For the Liberals, the major speech was made by Edward Blake. Excerpts from both, and a few others, are reproduced in the next reading.

between the Conservative government and the Liberal opposition, but this difference is not important to our analysis. All we need do is to separate it from the crucial observation.

The Conservative government's justification for the Bill was that a wrong had been done to the Roman Catholics in Manitoba, which the Parliament had a duty to remedy. Most of the Conservative members accepted this justification and supported the bill, and they were joined by a few Liberals, most of them from Quebec. All of these supporters, or at least those who spoke in any way that was relevant, argued or assumed that the right existed.

The Liberals opposed the Bill, and their response, unveiled by Laurier early in the debate, was complex and subtle. Faced by a government in disarray and the prospect of election in the near future, Laurier sought to accommodate a tension between his strong beliefs in provincial autonomy, and his own belief that a right had been violated, and sought to satisfy the outcry from Roman Catholics from Manitoba and Quebec. He argued that the appeal permitted by the Manitoba Act was a means for redress given to a minority, and redress was surely needed, but respect for provincial autonomy demanded delicacy and diplomacy. The Bill should be opposed, not so much for its content, but because the government, in its dealings with Manitoba, had failed miserably to give this respect. During this speech, Laurier made a comment about rights that parallels Blake's speeches about the Rivers and Streams Act: "... [u]nder popular government, the majority must rule. ... It may be that the majority will ... do wrong to the minority. What is the remedy of the minority under these circumstances? The remedy of a minority under a free government is to agitate and endeavor to bring over the majority to their way of thinking. Most of the Liberals supported him in opposing the bill, and they were joined by a few renegade Conservatives, most of them from Ontario, driven to opposition by their antipathy towards separate schools.

In the words of one of the frustrated Conservative leaders, Laurier's strategy made a "vast umbrella" for the opposition, "under which they all gather and are protected from the pelting rain of criticism, ... but beneath which they all quarrel like cats and dogs. His frustration was understandable. The umbrella accommodated fundamental differences about the existence of the right. Some of the opponents argued or assumed that there was no right, but others, including Laurier himself, disagreed, and used the argument about diplomacy to combine opposition to the Bill and their belief in the right. (Laurier himself did not say much about rights in his speech about the Remedial Bill, but had argued earlier that rights to separate schools were given by both the B.N.A. Act and by section 22. In 1893, he derived rights from section 22 and from the spirit of the section 93: "whatever privileges are guaranteed to one minority in a province, I claim in the name of justice and fairness for all minorities in all of the provinces.")

~

Having described the different patterns of support for the existence of the right and for the Bill, we can turn to an analysis of the arguments. The arguments for the existence of the right met an large obstacle at the threshold in *Barrett*, because the decision of the

Privy Council flatly denied that the right was given by the Manitoba Act. Even though most lawyers believed that this holding was at least surprising, if not wrong, virtually all of them accepted it as an authoritative interpretation. Deprived of a source in a constitutional text, the argument was based on a claim that during the discussions preceding the Manitoba Act and the entry of Manitoba into Confederation, there was a commitment from the Canadian government, or a compact, that the Roman Catholic schools in Manitoba were to have constitutional protection from a Protestant majority. The argument continued by claiming that this compact created a moral right, which would also have been a legal right if the Manitoba Act had been properly drafted (or properly interpreted). It was nonetheless a right that Parliament was obligated to enforce. As well, some speakers derived the same right from the B.N.A. Act, or claimed that a commitment to respect the two cultures was made at Confederation.

The most thoughtful expression of these arguments, was made by David Mills, and the fact that he was a Liberal and in opposition is a demonstration of the differences we have just described. Beginning by explaining a compact as an agreement among "two of the elements that constitute the community ... intended to regulate the conduct of the sovereign," he claimed that a compact was made at Confederation, and expressed in section 93 of the B.N.A. Act. In particular, separate schools were to be protected, not only in the original provinces, but in provinces joining in the future. Another compact, conferring the crucial right, was made during the making of the Manitoba Act, and it was given meaning by the original one. The means of protecting this right was the appeal under section 22(3), and in considering this appeal, Parliament was obligated to respect a "simple trust to guard the rights and privileges bestowed upon the minority ... and to restore them if they have been impaired or taken away," although he did contemplate the possibility that "higher reasons of state" might qualify the duty. Parliamentary supremacy made Parliament free, but only in the sense that there was "no power of compulsion" to enforce its duty. Here he elegantly articulated the faith, expressed by Blake and McCarthy in the Rivers and Streams debate, that legislative supremacy did not exclude constitutional obligation, and the duty of Parliament to respect the rule of law. At the end of the speech, though, he followed Laurier, opposing the bill, and calling for sensitivity and negotiation.

The arguments against the existence of a right, made by some Liberals and by the renegade Conservatives, began with the claim that there had been no compact made about separate schools at Union, and none at Confederation - or, at least, none that reached to Manitoba, and that there was no general commitment to respect two cultures. We need not unravel the debate about the facts preceding Union, even though it was in part an intriguing detective story. As well as being an argument about facts, the debate about compact was a debate about the sources of rights. The claim for the right was essentially that a community could make a solemn commitment about its conduct in the future - that it could create a right. In making this claim, though, the identity of the community and the conditions of the commitment were never clearly defined. Could the government of the day make the commitment? and what distinguished a compact from ordinary legislation? The impact of these questions was softened or obscured because the alleged compact was made as part of the making of a constitution - Manitoba's constitution, but